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No. 80-2208

In the Supreme Court of the United States

OCTOBER TERM, 1980

ERNEST L. CITRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ROBERT E. LINDSAY
GEORGE L. HASTINGS, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's finding that an IRS Agent properly initiated and conducted a civil audit of petitioner's tax records was clearly erroneous.

2. Whether the district court's finding that petitioner was not deceived into consenting to a search of his records was clearly erroneous.

3. Whether the district court abused its discretion in denying a motion for rehearing in order to allow petitioner to examine an additional witness.

4. Whether the district court's finding that petitioner consented to the removal of all relevant files from his business office was clearly erroneous.

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OPINIONS BELOW

The opinion of the district court denying petitioner's motion to suppress evidence and for judgment of acquittal (Pet. App. 1-32) is not reported. The opinion of the district court denying petitioner's motion for rehearing (Pet. App. 33-56) is not reported. The order of the court of appeals (Pet. App. 57-61) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1981. The petition for a writ of certiorari was filed June 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of wilfully attempting to evade his

federal income taxes for the years 1970, 1971, and 1972, in violation of 26 U.S.C. 7201 (Pet. App. 33-56). He was sentenced to concurrent two-year terms of imprisonment on each count, with all but six months of each term suspended, to be followed by two years' probation at the conclusion of his incarceration.

The pertinent facts, as reflected in the opinions below, were as follows. In September 1973, William A. Engelson, a revenue agent of the Internal Revenue Service, requisitioned and audited petitioner's tax returns for the calendar years 1970, 1971, and 1972 (Pet. App. 2). Prior to September 1973, Engelson had been assigned with a special agent to investigate possible criminal tax evasion by Tako Peshkopia, for whom petitioner had served as an attorney (Pet. App. 17). Based on the Peshkopia investigation, Engelson learned that petitioner had business dealings with Peshkopia involving substantial sums of money. It was the suspicion created by those business dealings that motivated Engelson to investigate petitioner's tax returns (Pet. App. 18-19).

Petitioner has been a licensed attorney in the State of Michigan for 27 years and has extensive business interests outside of the practice of law (Pet. App. 17, 19). The district court characterized him as "a man of considerable experience, ability, and undoubted *savior-faire*" (Pet. App. 23). On September 6, 1973, Engelson met petitioner at his law office and discussed the audit. The meeting apparently was amicable, and petitioner agreed to cooperate fully with the audit (Pet. App. 19-20). Petitioner allowed Engelson to go through the office freely, attempted to get a key for him, and even allowed him to stay in the office when no one else was around (Pet. App. 20-21). Petitioner testified that he had given Engelson permission to remove at least some records from the office and copy them (Pet. App. 22).

Engelson's audit consisted largely of comparing petitioner's law practice records of receipts for settled cases with "peg registers," which were petitioner's system of recording checks. Engelson took both the records[1] and the peg register to his office and copied them. He noticed significant discrepancies between these sets of records, confronted petitioner with them, and left the records with petitioner to allow him an opportunity to explain the problem (Pet. App. 39). Overnight, the receipts records were altered (*ibid.*). Engelson then referred the case to the Intelligence Division of the IRS.

Prior to trial, petitioner moved to suppress the business records that Engelson had copied on the grounds that the entire investigation was improperly motivated, that petitioner's consent to copy any records had been obtained through fraud and trickery by Engelson, and that, in any event, petitioner consented only to the copying of the peg register and not his receipts book.

After numerous pretrial hearings,[2] the district court held that Engelson's investigation was motivated in part by his suspicions that petitioner's tax returns might be incorrect, which was sufficient to justify a civil tax investigation (Pet.

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[1]Engelson did not, however, give petitioner a receipt for these records as provided in the Internal Revenue Manual (Pet. App. 23, 26). The reason for this failure is not clear. Engelson testified that he regarded the requirement as discretionary (Pet. 58). The district court apparently credited this explanation because it found that the failure did not mean that petitioner had refused to grant permission to take the records (Pet. App. 26).

[2]Prior to his indictment, petitioner had filed a motion seeking to have his business records returned and to enjoin further prosecution (Pet. App. 3). After two days of hearings, these motions were denied on the ground that the district court lacked jurisdiction over petitioner's claim, since there was an adequate remedy if an indictment issued (Pet. App. 4). The transcript of that hearing was made a part of the record in this case (Pet. App. 5).

App. 28). The district court also held that petitioner had failed to show that Engelson engaged in trickery or deceit in obtaining petitioner's consent to copy his business records (Pet. App. 31). Finally, the district court held that petitioner had consented to allowing Engelson to remove all relevant material, including the receipts records (Pet. App. 26).

A bench trial was held and the district court found petitioner guilty on all three counts of tax evasion. The court also denied petitioner's motion for rehearing (Pet. App. 53-54), finding it unnecessary to allow petitioner to examine Engelson's supervisor at the IRS to ascertain his role in instituting the investigation (Pet. App. 47). The court reasoned that it already was clear that Engelson had a proper motive in investigating petitioner, and thus his supervisor's role in the assignment process would add nothing (*ibid.*).

The court of appeals affirmed (Pet. App. 57-61). It held that the district court's findings on the scope of petitioner's consent and whether it had been obtained through deceit were not "clearly erroneous" (Pet. App. 60). It also ruled that it had examined "the other issues raised" by petitioner and found "them to be without merit" (Pet. App. 61).

ARGUMENT

1. Petitioner first contends (Pet. 21-33) that the entire investigation of his taxes was illegal because it was conducted without a proper civil tax investigation purpose and without "supervisory justification" (Pet. 31-32). Petitioner reasons that since his investigation arose out of the separate investigation into the narcotics and tax evasion activities of Peshkopia, the purpose for the investigation of petitioner was solely to further a non-tax, criminal investigation, in violation of 26 U.S.C. 7602.

The issue is a factual one that was properly decided against petitioner by the district court in its finding "that when Engelson went to [petitioner's] office to audit his

returns he had a legitimate purpose to determine their correctness" (Pet. App. 30). The finding was amply supported first by the fact that Engelson knew that petitioner had engaged in business transactions involving substantial sums of money with a suspected criminal, and therefore it was possible that petitioner had not declared all of his income. Second, Engelson's investigation, which was almost exclusively a review of petitioner's receipts and expenditures in his law practice to determine whether they corresponded to his tax returns, was fully consistent with a limited civil tax investigation. The court of appeals correctly held that the district court's finding was not clearly erroneous.

Petitioner's related concern that there was inadequate supervision of Engelson's motive for the investigation is both factually inaccurate and legally irrelevant. The only evidence shows that the agent's requisitions for the petitioner's tax returns were approved by his supervisor and that the audit of petitioner was officially assigned to him by his Internal Revenue Service superiors (Pet. App. 46). Moreover, petitioner cites nothing that requires a supervisor to review an agent's motive for initiating an investigation. See generally I Audit, CCH Internal Revenue Manual para. 4175.12 at 7118-7119. The district court's conclusion that the agent's motive was legitimate is sufficient to put to rest any claim of inadequate supervision.

2. Petitioner's second argument is that his consent to removal of his records was obtained through fraud and deception. Petitioner asserts that Engelson had a duty to disclose his suspicion that petitioner may have been connected with the illegal activities of Peshkopia and that the failure to disclose the basis for the inquiry misled petitioner into granting his consent.

First, we note that petitioner does not allege any "affirmative act" of misrepresentation, which has been regarded by the courts of appeals, including the Sixth Circuit in this

case (Pet. App. 60), as a necessary predicate to a finding of fraud in a tax audit situation. See *United States* v. *Nuth*, 605 F. 2d 229, 234 (6th Cir. 1979); *United States* v. *Marra*, 481 F. 2d 1196, 1203 (6th Cir.), cert. denied, 414 U.S. 1004 (1973); *United States* v. *Stribling*, 437 F. 2d 765, 772 (6th Cir.), cert. denied, 402 U.S. 973 (1971); *United States* v. *Prudden*, 424 F. 2d 1021, 1032 (5th Cir.), cert. denied, 400 U.S. 831 (1970). An agent's silence can constitute fraud only "where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." *United States* v. *Prudden, supra*, 424 F. 2d at 1032. Agent Engelson was under no duty to disclose his mere suspicions about petitioner's possible criminal activity. See *United States* v. *Marra, supra*, 481 F. 2d at 1203; *United States* v. *Stamp*, 458 F. 2d 759, 780 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972); *United States* v. *Stribling, supra*, 437 F. 2d at 773; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 421 (3d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); *United States* v. *Prudden, supra*, 424 F. 2d at 1033. Moreover, the district court correctly found (Pet. App. 23-27) that petitioner, as an experienced lawyer and businessman, realized the implications of the audit and therefore was not misled by Engelson's failure to disclose all of the leads that caused him to initiate the investigation. See *United States* v. *Nuth, supra*, 605 F. 2d at 234; *United States* v. *Stamp, supra*, 458 F. 2d at 780; *United States* v. *Prudden, supra*, 424 F. 2d at 1035. Accordingly, the district court and the court of appeals correctly found that petitioner's consent to the search of his records was properly obtained in this case.

3. Petitioner next argues (Pet. 47-54) that the district court should have reopened the suppression hearing after the trial to allow him to examine Engelson's supervisor with regard to his role in initiating petitioner's tax audit. Petitioner justifies the tardiness of his request by asserting that

he was surprised at trial to learn that Engelson's decision to audit had been approved by his supervisor.

The district court did not abuse its discretion in declining to reopen the case after trial. First, it is difficult to believe that petitioner really was surprised to learn that a supervisor had approved Engelson's decision to initiate the investigation. Second, the likelihood that the supervisor had any additional information not obtained by petitioner after the numerous previous hearings was very small. Finally, the evidence fully supported a determination that Engelson initiated the audit process with a proper civil tax investigation motive. The district court properly recognized that nothing his supervisor could say was sufficiently likely to affect that conclusion to justify the unusual step of reopening the suppression motion hearing (Pet. App. 47).

4. Finally, petitioner argues (Pet. 55-61) that, even if he did consent to Engelson's examination of some of his peg registers, his consent did not extend to allowing Engelson to copy his receipts records. The district court rejected this fact-bound claim, finding

> it highly unlikely that a lawyer who gave a revenue agent the full run of his office, sought to get him a key for that office, and gave him permission to take records from the office without any restriction as to copying, and who on occasion left while the revenue agent was still working on records in his office, can credibly maintain that he did not also permit the revenue agent to take other records from the office.

(Pet. App. 25-26).

Petitioner attempts to overturn these findings by arguing that they ignore the crucial fact that Engelson failed to give petitioner a receipt for those records. In light of the overall informal atmosphere surrounding the audit, however, it

hardly seems surprising that Engelson failed to give petitioner a receipt for all of the records he removed from the office.

The district court's factual determination regarding the scope of consent, affirmed by the court of appeals, was correct and warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ROBERT E. LINDSAY
GEORGE L. HASTINGS, JR.
Attorneys

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